(2)

No. 96-1919

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DP PARTNERS, LIMITED PARTNERSHIP and SUSSEX PROPERTIES, INC.,

Petitioners,

vs.

HALL FINANCIAL GROUP, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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40 pp

QUESTIONS PRESENTED

I. May an unsuccessful proponent of a competing plan of reorganization in a bankruptcy proceeding be found to have waived its right to reimbursement for administrative expenses under 11 U.S.C. §§ 503(b)(3)(D), (b)(4), if that unsuccessful plan proponent fails to disclose its intention to make a claim prior to confirmation of the debtor's plan of reorganization?

II. Does the use of the word "shall" in the language of § 503(b) preclude a bankruptcy court from determining that a previously undisclosed administrative claim of an unsuccessful plan proponent is untimely, if filed within the claims bar date but after confirmation of the plan of reorganization?

III. Having determined that the administrative claim of the unsuccessful plan proponent is untimely, does a bankruptcy court commit error by then allowing any portion of that claim?

IV. Did the Fifth Circuit Court of Appeals adopt an incorrect interpretation of "substantial contribution" under 11 U.S.C. § 503 by disregarding the relevance of intent and motivations of the creditor in its role as a proponent of a competing plan of reorganization?

INTERESTED PARTIES

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Hall Financial Group, Inc., ("HFG"), Respondent, files this its Brief in Opposition, asking this Court to deny DP Partners Limited Partnership's Petition for Writ of Certiorari (the "Petition") to review the judgment of the United States Court of Appeals for the Fifth Circuit, filed on May 31, 1997. The opinion of the Fifth Circuit, entered on February 28, 1997, is reported at 106 F.3d 667 (5th Cir. 1997). It is reprinted in the Petition at Appendix A.

STATUTES INVOLVED

11 U.S.C. § 503(b)(3)(D) and (b)(4):

> Allowance of administrative expenses
>
> (b) After notice and hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including —
>
> * * *
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by —
>
> * * *
>
> (D) a creditor, indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a

> substantial contribution in a case under chapter 9 or 11 of this title;
>
> * * *
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

STATEMENT OF JURISDICTION

The Petition asserts that the granting of certiorari is proper under 28 U.S.C. § 1254(1) and Sup. Ct. R. 10(a) and (c). However, DP Partners Limited Partnership ("DPP"), the Petitioner, failed to seek appellate review of the issues encompassed in Questions III and IV at the Fifth Circuit. (*See* Appendix A, the docket on appeal from the District Court to the Fifth Circuit. Petitioner did not cross-appeal on any issue decided by the District Court; Appendix B to the Petition, the opinion of the District Court upholding the Bankruptcy Court's findings that Respondent had made a substantial contribution to the debtor's estate). Nonetheless, the Fifth Circuit examined the issue of what bearing intent should have on whether an administrative claim for substantial contribution should be awarded under 11 U.S.C. § 503(b)(3)(D).

STATEMENT OF THE CASE

HFG generally agrees with DPP's Statement of the Case, save for the editorial comments on HFG's motivation and the complaint that HFG was seeking to secure the assets of DPP at a bargain price.[1] Those characterizations are denied. HFG also denies that it purchased claims solely to make a bid to State Street Bank. HFG purchased claims to file a competing plan of reorganization. HFG did so because DPP's then existing plan of reorganization grossly undervalued the assets of the debtor and did not provide a fair return for creditors in the case. The case presented an opportunity for HFG to reorganize the debtor entity, acquire control of five properties, and still give the creditors a far better return than DPP offered. HFG notes that its plan of reorganization notified parties in interest that HFG would seek recovery of its fees and expenses if its plan were confirmed.

The opinion of the Fifth Circuit answered two questions raised by HFG: a) is there a requirement that a creditor give advance warning, before the deadline for administrative claims, that it will seek an administrative claim for a substantial contribution under 11 U.S.C. §§ 503(b)(3)(D) and (b)(4); and (b) once the Bankruptcy Court finds that a creditor has made a substantial contribution, does the Court have discretion to award less than the reasonable and necessary fees and expenses that the creditor incurred to achieve the substantial contribution. DPP argued in their brief and at oral argument to the Fifth Circuit that HFG's self-interested motivation absolutely foreclosed a finding of substantial contribution. DPP never argued to the Fifth Circuit or to the District Court that the Bankruptcy Court, the fact finder, applied the wrong standard to the facts presented when it found that HFG had made a substantial contribution.

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1. The Bankruptcy Court found that HFG's participation in the case caused more money to be paid to the creditors of the DPP bankruptcy estate. The District Court and the Fifth Circuit left that finding undisturbed.

REASONS FOR DENYING THE WRIT

SUMMARY

DPP asserts two bases for review. The first concerns DPP's assertion that the Bankruptcy Court can retroactively require advance notice of a substantial contribution claim, during the Chapter 11 plan confirmation process. DPP asserts that, despite HFG's compliance with the requirements of § 503(b) and HFG's compliance with the administrative bar date set forth in the order of confirmation, HFG's failure to give advance notice of its substantial contribution claim is grounds for denial of such a claim. DPP argues that the Bankruptcy Court can have an unwritten bar date as to one type of administrative claim, substantial contribution claims, that does not appear in the Bankruptcy Code or in the Rules of Bankruptcy Procedure. The petition argues that the issue is exceptionally important to the integrity of the Chapter 11 plan confirmation process. It is not. The Fifth Circuit's opinion correctly applies the language of the statute. There is no conflict among the Circuits on the issue of advance notice. The position taken by other Bankruptcy Courts on an advance notice requirement is not a conflict amongst the Circuits. There is no basis for discretionary review.

The second issue DPP raised is whether the Fifth Circuit adopted an erroneous standard for determining whether a creditor made a substantial contribution for purposes of 11 U.S.C. § 503(b)(3)(D). The Fifth Circuit opined that the creditor's intent was of little consequence in such a determination. However, the Fifth Circuit's opinion on the question of intent was not crucial to upholding the Bankruptcy Court's determination. The Fifth Circuit left the Bankruptcy Court's substantial contribution fact finding intact because the finding was not clearly erroneous, not because the Bankruptcy Court used the standard as articulated by the Fifth Circuit.

Nothing indicates that the Bankruptcy Court used an improper standard. The case law authority in DPP's Petition was presented to the Bankruptcy Court. Based upon the case law, the Bankruptcy Court found that HFG had made a substantial contribution. The District Court had the benefit of the same decisions in upholding the finding of a substantial contribution. The District Court stated that the evidence showed that HFG had overcome the presumption that the creditor's involvement in the case was motivated by self-interest. (*See* Appendix B to the Petition). DPP's substantive argument is that the Bankruptcy Court used the proper legal standard but reached an erroneous factual conclusion. There is nothing for this Court to review as to whether the Bankruptcy Court's specific finding of fact of a substantial contribution is proper.[2]

Finally, the Fifth Circuit did not adopt a new standard. It merely expressed the existing standard in a different way. The Fifth Circuit's position is consistent with the position taken by other Circuit Courts.

I.

THERE IS NO CONFLICT AMONGST THE CIRCUIT COURTS OF APPEAL AS TO THE CONSTRUCTION OF §§ 503(b)(3)(D) AND (b)(4) AND AS TO WHETHER THERE IS A REQUIREMENT OF ADVANCE NOTICE BEFORE CONFIRMATION THAT CREDITOR WILL ASSERT A SUBSTANTIAL CONTRIBUTION CLAIM.

DPP cites no Circuit level case law authority, nor is there any Circuit level authority, for DPP's argument that the Bankruptcy Court can impose, retroactively, a requirement that

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2. Sup. Ct. R. 10 states that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

an administrative claim for substantial contribution be disclosed before confirmation. Without a conflict among the Circuit Courts on this point, DPP is not entitled to review[3], unless it can meet one of the other requirements of 28 U.S.C. § 1254 and Sup. Ct. R. 10.

DPP points out that the Fifth Circuit stated that the Bankruptcy Court has discretion in setting an administrative bar date. DPP uses this statement to argue that the Bankruptcy Court can impose retroactively an unpublished and undisclosed requirement that a prospective administrative claimant must give notice of its claim before approval of the disclosure statement or plan confirmation. When the Fifth Circuit stated that the Bankruptcy Court had discretion in setting an administrative bar date, it meant just that, *setting* a bar date. All Circuits agree that a Bankruptcy Court has the power to set an administrative bar date for substantial contribution claims before the end of the confirmation process. What the Fifth Circuit has stated is that there are no implied bar dates. A bar date must be set forth explicitly in a published rule or in an order. There are no Circuit cases that hold that a Bankruptcy Court can enforce an implied bar date.

Prior to the hearing on the disclosure statement, there was no bar date. The Bankruptcy Court could have set one, but since DPP did not seek a bar date, the Bankruptcy Court did not do so. Prior to the plan confirmation hearing there was no bar date set for administrative claims. DPP did not seek one. The Bankruptcy Court could have set one. However, DPP did not

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3. Rule 10 does not restrict this Court's power to conflicts between the Circuits, but conflicts with lower level courts rarely will justify review by this Court: "[only] in very rare instances, will a conflict between a decision of the Court of Appeals and that of a district court [or its unit the bankruptcy court] in some other circuit suffice" Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 548 (1958).

ask. Since DPP did not seek a pre-confirmation bar date for administrative claims, the Bankruptcy Court did not impose one. The bar date for administrative claims was set by the provisions by the order confirming the plan. (*See* Appendix B, the applicable section of the confirmation order). HFG followed all of the stated and noted prerequisites by timely filing its administrative substantial contribution claim.

II.

A PLAIN READING OF THE NOTICE AND HEARING REQUIREMENTS OF § 503(b), IN THE CONTEXT OF A CHAPTER 11, DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW[4].

DPP argues that not having an unwritten, implied bar date for filing an administrative claim for making a substantial contribution to the case presents an important question of federal law because the Bankruptcy Court, the creditors, and the debtor or plan proponent will not know what amount of funding will be necessary to make the plan confirmable. DPP states that non-disclosure will wreak havoc on the plan confirmation process. DPP asserts that the Bankruptcy Court cannot determine plan feasibility without mandatory pre-confirmation disclosure of substantial contribution claims. DPP states that substantial contribution claims should be made known or the integrity of the plan process will suffer. DPP argues that the potential claimant is required to disclose its intent to file such a claim or lose the right to seek such an award.

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4. It should be noted that the Fifth Circuit, in its discussion of § 503(a), cited the post October 1994 version of § 503(a). The applicable version of § 503(a) in the case at bar does not state "timely" or "or tardily file such request if permitted by the court for cause." The DPP case was filed in 1993 in Phoenix, Arizona, as Case No. 93-10672 and then transferred to Dallas, Texas, in March of 1994, as Case No. 394-31738 upon a change of venue motion by the secured lender.

DPP asserts that bankruptcy policy imposes upon those who have made a substantial contribution to a case a duty of disclosure, principally because the Debtor has to meet disclosure requirements. If I must, you must. DPP cites no statutory authority for the requirement. It would be more convenient for plan proponents if the Bankruptcy Code required all administrative claimants to disclose their claims before confirmation. However, neither the Bankruptcy Code nor the Rules imposes such a requirement. Congress chose not to impose that requirement on administrative claimants. The only authority that DPP presents is authority applicable to the plan proponent's requirements and case law from a few Bankruptcy Courts.

The case at bar does not concern important federal policy. The problem was DPP failed to seek out information. There were adequate means for DPP to learn the information needed to determine the feasibility of its plan. However, the plan proponent must use the tools provided, the Bankruptcy Code and the Rules. The ability of a creditor to seek a substantial contribution claim is statutorily granted and therefore is assumed to be known. The fact that a competing plan has raised the ante by millions of dollars is a sufficient hint that a substantial contribution claim may be forthcoming and that the plan proponent should prepare for such an eventuality[5]. If the plan proponent, in light of another creditor taking pains to find potential fraudulent transfers to insiders and affiliates of the debtor, fails to inquire about the fees that the creditor has incurred and specifically to ask if a claim for same will be filed, then the plan proponent has not done its job. The plan proponent has the means to inquire and the duty to find out so that it may disclose the information to creditors. If the creditor denies the intent to seek such a claim,

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5. As set forth in the Fifth Circuit's opinion at Appendix A of the Petition, HFG in its disclosure statement and plan, provided for the payment of attorneys fees for HFG's counsel and debtor's counsel, after a fee application hearing with proper notice.

the plan proponent establishes an estoppel defense. Additionally, the plan proponent can request that the Bankruptcy Court set a bar date for disclosing the intent to file administrative claims for substantial contribution. Substantial contribution claims are not barred merely because the plan proponent failed to use the tools provided to ascertain their amount. No other kinds of administrative claims are barred because they were not disclosed or because the plan proponent failed to ascertain them.[6] More importantly, the plan proponent's lack of diligence does not create an important question of federal law.

DPP complains that HFG should have objected to the feasibility of DPP's plan because the plan did not address substantial contribution claims. DPP confuses points here. HFG never stated that DPP's plan was not feasible because it did not provide for a substantial contribution claim. HFG would be estopped to use that specific infirmity, were it to exist.[7] Most importantly, the failure to object, as with the other asserted sins of HFG, is not a basis for granting review by this Court. The issue is whether or not having an implied, unpublished, and unknown bar date on substantial contribution claims is such an intolerable state of affairs under federal bankruptcy law that this Court should take up the issue. There are no conflicts in the Circuits on this issue. Moreover the notice requirement urged by DPP is not present in a plain reading of the § 503(b) or elsewhere in the Bankruptcy Code. DPP, and parties in their position, have the means to secure the information or compel the filing of claims during the initial stages of the confirmation process.

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6. A plan proponent's fees and expenses are different. The proponent knows what his fees and expenses are or what they likely will be. The plan proponent is obligated to disclose them.

7. Appendix C is an exhibit from the Plan Confirmation hearing that shows that the new partners were willing to put up $200,000 towards legal and other fees. There never was a feasibility issue in this case.

III.

THERE IS NO ISSUE BEFORE THIS COURT ON WHETHER HFG MADE A SUBSTANTIAL CONTRIBUTION IN THE DPP CASE.

DPP seeks review of the Fifth Circuit decision that a creditor's intent or motivation is not relevant to whether the creditor made a substantial contribution in the case. DPP failed to preserve any error on that issue. DPP does not seek review of the determination that HFG made a substantial contribution in that case, as found by the Bankruptcy Court and as sustained on cross-appeal by the District Court. The Fifth Circuit noted that the findings made by the Bankruptcy Court were not clearly erroneous. The Fifth Circuit was not asked to review the finding of substantial contribution. The underlying basis for the finding of substantial contribution by the Bankruptcy Court was not reviewed. DPP did not present the issue of whether the Bankruptcy Court applied the proper standard in finding that HFG made a substantial contribution. DPP has never argued that the Bankruptcy Court applied the wrong standard in finding that HFG made a substantial contribution. DPP has not presented an issue in its Petition that the Bankruptcy Court applied an improper standard in finding that HFG made a substantial contribution.

The standard by which the Bankruptcy Court determined that HFG had made a substantial contribution, and the standard by which the District Court affirmed the finding on cross-appeal, was the standard set forth in the case law that was in existence at the time. The Bankruptcy Court cited exactly the same cases that DPP presents to this Court. As such the Bankruptcy Court's decision that a substantial contribution was made cannot be challenged now by arguing that the Bankruptcy Court applied an erroneous standard.

This Court has stated in *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) that it has the power to review new issues in the interest of judicial administration. The issue of whether or not HFG made a substantial contribution under the existing standards does not affect judicial administration. It only affects DPP and HFG. This Court has stated in *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) that, although this Court has the power to consider issues not presented in the petition and not argued or presented on appeal, it would only do so in appropriate circumstances. These are not appropriate circumstances. Even if DPP's legal analysis were correct, the finding of a substantial contribution by HFG is merely an erroneous finding of fact. That finding does not present an important federal question.

DPP has never stated that the Bankruptcy Court applied an improper standard. DPP merely disagreed with the conclusion, although the disagreement was not sufficient for DPP to raise the issue before the Fifth Circuit. DPP has not raised the issue of whether the finding of the Bankruptcy Court was made under an improper standard at any stage. This Court held in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) that:

> Our Rule 14.1(a) makes clear that "[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court," and our Rule 24.1(a) states that a brief on the merits should not "raise additional questions or change the substance of the questions already presented" in the petition. See *Yee v. Escondido*, 503 U.S. 519, 535 (1992). In addition, we have said that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Youakim v. Miller*, 425 U.S. 231, 234(1976) (per curiam).

This Court's intervention is not necessary. The unstated issue of whether HFG made a substantial contribution, as determined by the Bankruptcy Court, does not meet the requirements of an important issue of federal law or of judicial administration so as to justify review.

IV.

THE FIFTH CIRCUIT'S DECISION ON INTENT AND MOTIVATION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT ON AN IMPORTANT FEDERAL QUESTION.

Under 28 U.S.C. § 1254 and Sup. Ct. R. 10, the Court will grant review to resolve a conflict among the Circuit Courts on an important federal question. The alleged conflict is whether the claimant's intent and motivation are relevant to whether the creditor made a substantial contribution in the case. The Fifth Circuit opined that the creditor's subjective motivations are not relevant to the determination. DPP does not agree, and it argues that there is a conflict among the Circuits. There is not. Most of the cases cited by DPP are Bankruptcy Court cases, not Circuit Court cases. This Court rarely grants review to resolve conflicts between Circuit Courts and Bankruptcy Courts.[8] The only Circuit Court case cited by DPP is *In re Lister*, 846 F.2d 55 (10th Cir. 1988). *Lister* does not say that the creditor's subjective motivation is important. *Lister* states:

> Generally, creditors are presumed to act primarily in their own interest and not for the benefit of the estate as a whole.

Id. at 57. The Tenth Circuit did not review why Mr. Haskins, the claimant and the applicant, did what he did. Rather the Tenth

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8. *See* footnote 3, *infra.*

Circuit examined what he did. His action was the key in affirming the denial of a substantial contribution claim. Most of what Mr. Haskins did occurred before the Chapter 11 case was filed. Mr. Haskins' actions after the filing did not meet the criteria for a substantial contribution. His actions did not overcome the presumption of self-interest.

The Fifth Circuit, cited *Lebrom v. Mechem Financial, Inc.*, 27 F.3d 937 (3rd Cir. 1994) in its discussion about substantial contribution. The Third Circuit in *Lebrom* follows the position articulated by the Tenth Circuit as to motivation and intent.

> Creditors are presumed to be acting in their own interests until they satisfy the court that their efforts have transcended self-protection.

Id. at 944. The other circuits say the same thing that the Fifth Circuit has stated here. Self-interest by creditors is presumed to exist. It is therefore largely immaterial to the determination of whether a substantial contribution has been made. The claimant must overcome the presumption that it acted only to benefit itself. The presumption is not overcome by showing altruistic motivation. The administrative claimant overcomes the presumption by showing that its efforts made a substantial contribution in the case, either by increasing substantially the payments to creditors or by contributing substantially to the reorganization of the debtor. No Circuit Court has held that a finding of substantial contribution depends upon the claimant's selfless motivation. There is no conflict in the Circuit Courts.

V.

THE FIFTH CIRCUIT'S DECISION ON INTENT AND MOTIVATION IS NOT AN IMPORTANT FEDERAL QUESTION THAT THIS COURT NEED REVIEW.

DPP asserts that the issue of intent is an important question of federal law that should be settled by this Court. Such is not the case. The presumption of self-interest with regard to determining whether to allow a substantial contribution claim pre-dates the Bankruptcy Code. The case of *In re Solar Mfg. Corp.*, 200 F.2d 780 (3rd Cir. 1953); *In re Mt. Forest Fur Farmers of America, Inc.*, 157 F.2d 640 (6th Cir. 1946) and *Skere v. Baldwin Locomotive Works*, 98 F.2d 889, 891 (3rd Cir. 1938), as cited in *Lebrom* makes the same point. Various cases at the Bankruptcy Court level are proceeding under the guidance of three prior Circuit Court cases, *Lister, Lebrom* and *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986). All three cases direct the lower courts to presume self-interest when making the determination of a substantial contribution. The Fifth Circuit's decision in *DPP Partners* does not alter that landscape. It merely states it differently. Intent is not an issue, says the Fifth Circuit. The issue is benefit to the estate or to the reorganization. The other circuits agree. It is presumed that the creditor acts in its own self-interest. There is no federal question as to intent, that needs to be settled by this Court.

CONCLUSION

There are no Circuit Courts that conflict with the opinion of the Fifth Circuit below. There are no important questions of federal law that this Court needs to resolve. The Fifth Circuit's ruling that: (a) 11 U.S.C. § 503 does not contain an unwritten requirement that a creditor give advance notice of a substantial contribution administrative claim prior to plan confirmation; and (b) that intent is not an issue in a substantial contribution application, is a straightforward reading of § 503 and a continuation of the stated position in the Circuits that, since creditor self-interest is presumed, it is of little relevance to the determination of whether a substantial contribution has been made in a case.

There are no bankruptcy policy issues in this case. HFG was entitled by statute to file its substantial contribution claim. DPP is deemed to know of that right. DPP had the tools to learn whether HFG would file an administrative claim and for what amount. DPP failed to utilize the available tools. DPP's errors do not create an important question of bankruptcy policy or judicial administration. For these reasons the Petition should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT DOCKET ENTRIES

M-TOL APPEAL
CLOSED

U.S. District Court
Northern District of Texas (Dallas)

CIVIL DOCKET FOR CASE #: 95-CV-115

Hall Financial Group v. DP Partners Ltd. et al Filed: 01/19/95
Assigned to: Judge Jorge A Solis
Demand: $0,000 Nature of Suit: 422
Lead Docket: None Jurisdiction: Federal Question
Dkt # in bk court: is 394-31738-RCM-11

Cause: 28:1334 Bankruptcy Appeal

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Appendix A

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Appendix A

SUSSEX PROPERTIES INC appellee	Anthony Alan Petrocchi Attorney at Law (See above) [COR ret] Christopher M Weil, Attorney at Law (See above) [COR LD NTC ret]

Bankruptcy Judge: ROBERT C MCGUIRE
Bankruptcy Judge

HALL FINANCIAL GROUP, INC
appellant

v.

DP PARTNERS LTD PARTNERSHIP; SUSSEX PROPERTIES INC
appellee

Date		Proceedings
1/19/95	—	PRELIMINARY ASSIGNMENT TO Magistrate Judge John B Tolle (yrw) [Entry date 01/24/95]
1/19/95	1	Letter from U.S. Bankruptcy Court transmitting bankruptcy record on appeal. (15+) (yrw) [Entry date 01/24/95]
1/24/95	2	Letter transmitting bankruptcy record on appeal to presiding judge. CC to counsel, bankruptcy clerk and bankruptcy judge. Appellant's brief due 2/8/95 for Hall Financial Group (1) (yrw)

Appendix A

2/9/95	3	MOTION by appellee DP Partners Ltd for law firm of Ungerman & Vickers atty Ungerman & Schurr to withdraw as attorney (4) (mer) [Entry date 02/10/95]
2/10/95	4	ORDER granting [3-1] motion for law firm of Ungerman & Vickers atty Ungerman & Schurr to withdraw as attorney (Terminated attorney Ungerman & Schurr and the Law firm of Ungerman & Vickers for DP Partners Ltd (signed by JAS) Copies to counsel: 2-10 Page(s) 2 (mer) [Entry date 02/13/95]
2/13/95	5	Appellant's BRIEF by appellant Hall Financial Group. Appellee's brief due 2/28/94 for Sussex Properties, for DP Partners Ltd (15+) (mer) [Entry date 02/14/95] [Edit date 02/17/95]
2/15/95	6	CERTIFICATE OF SERVICE Re: [4-1] order by appellee DP Partners Ltd re mtn to w/draw as cnsl served upon cnsl for Hall Financial Group (4) (mer)
2/28/95	7	UNOPPOSED MOTION by appellee DP Partners Ltd, appellee Sussex Properties to extend time to file brief of appellee (5) (mer)
3/1/95	8	ORDER granting [7-1] motion to extend time to file brief of appellee, reset appellee's brief due for 3/7/95 for Sussex Properties, for DP Partners Ltd (signed by JAS) Copies to counsel: 3-1 Page(s) 1 (mer)

Appendix A

3/7/95	9	SECOND MOTION with memorandum in support by appellee DP Partners Ltd, appellee Sussex Properties to extend time to file brief of appellee (5) (mer) [Entry date 03/08/95]
3/14/95	10	Appellee's BRIEF by appellee DP Partners Ltd, appellee Sussex Properties. (15+) (lmn) [Entry date 03/16/95]
3/30/95	11	UNOPPOSED MOTION by appellant Hall Financial Group to extend time to file reply brief (5) (mer) [Entry date 03/31/95]
3/31/95	12	ORDER granting [11-1] motion to extend time to file reply brief, reset Appellant's reply brief due for 5:00 4/5/95 for Hall Financial Group (signed by JAS) Copies to counsel: 3-31 Page(s) 1 (mer) [Entry date 04/01/95]
4/4/95	13	ORDER granting [9-1] motion to extend time to file brief of appellee, RESET appellee's brief due for 3/14/95 for Sussex Properties, for DP Partners Ltd (signed by JAS) Copies to counsel: 4/4/95 Page(s) 1 (jac) [Entry date 04/06/95]
4/5/95	14	Appellant's REPLY BRIEF by appellant Hall Financial Group. (15+) (mer) [Entry date 04/07/95]
4/10/95	15	NOTICE of Erratum and Correction by appellant Hall Financial Group (5) (mer)
4/19/95	16	MOTION by appellant Hall Financial Group to extend time to file reply brief of appellees/cross-appellants (5) (mer) [Entry date 04/20/95]

Appendix A

4/20/95	17	ORDER granting [16-1] motion to extend time to file reply brief of appellees/cross-appellants, RESET appellee's brief due for 4/20/95 for Sussex Properties, for DP Partners Ltd (signed by JAS) Copies to counsel: 4/20/95 Page(s) 1 (jac) [Entry date 04/24/95]
4/20/95	18	Appellee's BRIEF by appellee DP Partners Ltd. appellee Sussex Properties. Appellant's reply brief due 5/1/95 for Hall Financial Group (15) (jac) [Entry date 05/02/95]
8/11/95	19	ORDER for Oral Argument on Bankruptcy Appeal on 11/8/95 at 3:00 p.m. (signed by JAS) Copies to counsel: 8-14-95 Page(s) 1 (lch) [Entry date 08/15/95]
11/3/95	20	MEMORANDUM OPINION AND ORDER . . . the Court AFFIRMS the Bankruptcy Court's Order of 11/14/94 regarding the issues presented within this appeal . . . SEE ORDER FOR SPECIFICS (signed by JAS) Copies to counsel: 11-6-95 Page(s): 12 (lch) [Entry date 11/06/95]
11/3/95	—	Case closed (lch) [Entry date 11/06/95]
11/6/95	—	8 vols of bankruptcy papers placed on designated shelf in fileroom. Return to Bankruptcy Court on 12/11/95 if no appeal or motion filed (gjs) [Entry date 11/14/95]
11/20/95	21	NOTICE OF APPEAL to USCA by appellant Hall Financial Group from order entered 11/2/95. Fee payment amount: $105.00 Receipt # 76394 (sak) [Entry date 11/22/95]

Appendix A

11/22/95 — Notice of appeal and certified copy of docket to USCA: [21-1] appeal (sak)

11/29/95 22 DESIGNATION of items to be included by appellant Hall Financial Group in the record and statement of issues on appeal to the United States Fifth Circuit Court of Appeals (6) (jyg) [Entry date 11/30/95]

12/8/95 — USCA Case Number, 95-11110 Re: [21-1] appeal (bss)

12/11/95 23 APPELLEES DESIGNATION by DP Partners Ltd of record on appeal. (4) (bss) [Entry date 12/15/95]

12/11/95 23 STATEMENT OF ISSUES ON APPEAL TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS by DP Partners Ltd (4) (bss) [Entry date 12/15/95]

12/21/95 — Transmitted record on appeal to U.S. Court of Appeals: [21-1] appeal . . . 1 vol of district court papers; 5 vols of appellants designation (bk papers); 1 vol of cross appellants designation (bk papers); 3 vols of appellee/cross appellant's designation (bk papers) TOTAL BK VOLS - 9); and 1 env. of bk exhibits and 1 vol of bk exhibits. (TOTAL VOLS OF CASE PAPERS - 10 and 2 containers of exhibits.) (bss)

Docket as of February 13, 1996 10:55 am

APPENDIX B — EXCERPTED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION ENTERED AUGUST 31, 1994

Arthur I. Ungerman
State Bar No. 20391000
Patrick J. Schurr
State Bar No. 17853530
UNGERMAN & VICTERS
1401 San Jacinto Tower — LB 74
2121 San Jacinto Street
Dallas, Texas 75201
Telephone: (214) 740-0229

ATTORNEYS FOR THE DEBTOR

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CASE NO. 394-31738-RCM-11

IN RE:

DP PARTNERS LIMITED PARTNERSHIP,

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING SECOND AMENDED PLAN OF REORGANIZATION, AS AMENDED, OF DP PARTNERS LIMITED PARTNERSHIP

DP Partners Limited Partnership (the "Debtor") presented

its Second Amended Plan of Reorganization (the "DP Plan" or "Plan"), filed July 1, 1994 and the First Amendment to the Second Amended Plan of Reorganization of DP Partners Limited Partnership dated August 11, 1994 (the "Amendment"), and attached hereto as Exhibit "A", and Hall Financial Group, Inc. ("HFG") presented its Second Amended Plan of Reorganization for DP Partners (the "HFG Plan") dated July 13, 1994 to this Court on August 12, 1994. At such time, the Court heard testimony and stipulations of counsel, reviewed the DP Plan and the HFG Plan and found:

A. *Findings and Conclusions.* Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact where appropriate.

* * *

unsecured, and for secured indebtedness that is satisfied pursuant to the Plan.

(f) *Judgments.* Except as provided in the Plan and subject only to the occurrence of the Effective Date, any judgment at any time obtained, to the extent that such judgment is a determination of personal liability of the Debtor with respect to any debt or claim discharged hereunder, is hereby rendered null and void.

(g) *Retention of Jurisdiction.* The Court shall retain jurisdiction of this case in accordance with the Plan, including, without limitation, section XII of the Plan, Section 1142 of the Code and Bankruptcy Rule 3020(d).

Appendix B

(h) *Administrative Claim.* Notwithstanding anything to the contrary set forth in the Plan, all applications for final compensation of professional persons, employed by the Debtor and approved by this Court for services rendered prior to Confirmation and all other requests for payment of administrative costs and expenses incurred prior to Confirmation pursuant to Section 501(a)(1) or 507(b) of the Code (except claims for taxes, trade debt and customer deposits and credits incurred in the ordinary course of business), to the extent not previously filed with the Court or allowed by order thereof, shall be filed no later than sixty (60) days after the Effective Date. Failure to file such Claims, including Administrative Claims, within the time periods set forth herein shall result in the disallowance of such Claims. Payment of any such Administrative Claims will be and hereby are subject to any limitation imposed in the Plan.

(i) *Objections to Claims.* The Debtor shall commence, file or assert any objections to Claims no later than ninety (90) days after the Effective Date. Failure to file such objections within the time periods set forth herein shall result in the allowance of such Claims.

SIGNED this the day of August, 1994.

ROBERT C. MCGUIRE, JUDGE
UNITED STATES BANKRUPTCY COURT

Agreed to as to form and
substance:

Appendix B

UNGERMAN & VICKERS
1601 San Jacinto Tower - LB 74
2121 San Jacinto Street
Dallas, Texas 75201
Telephone: (214) 740-0229

By: s/ Patrick J. Schurr
Arthur I. Ungerman
State Bar No. 20391000
Patrick J. Schurr
State Bar No. 17853530

ATTORNEYS FOR THE DEBTOR

FULBRIGHT & JAWORSKI, L.L.P.
2200 Ross Avenue
Suite 2800
Dallas, Texas 75201
Telephone: (214) 855-8000

By: s/ Michael W. Anglin
Michael W. Anglin
State Bar No. 01260800

ATTORNEYS FOR STATE STREET
BANK AND TRUST

APPENDIX C — EXHIBIT FROM THE PLAN CONFIRMATION HEARING

August 11, 1994

VIA TELECOPY

Mr. Joseph Melton
Mr. Tony Swartz
Sussex Investments, Inc.
2121 San Jacinto Street
Suite 1420
Dallas, Texas 75201

Re: *Internal structure of DP Partners*

Dear Messrs Melton and Swartz:

This is to confirm our agreement concerning the relationship of the partners in DP Partners Limited Partnership ("Partnership"). The following is a description of that agreement:

1. *Partnership Interests:* The partners will have the following interests in and to the Partnership:

Partner	Type	Interest
Sussex Properties, Inc. ("Sussex")	General	1.00%
BH Associates Limited Partnership	Limited	49.50%
Chateau Estates ("Chateau")	Limited	24.75%
Irving Smokler	Limited	24.75%
		100.00%

Appendix C

It is understood that Irving Smokler's interest will be held either by him or an entity owned or controlled by him. It is also understood that Chateau did not intend to sell, transfer or otherwise relinquish its beneficial interest in and to the Partnership and that Sussex has been holding Chateau's interest in trust on behalf, and for the benefit, of Chateau as a limited partner. The remaining partners in the Partnership have heretofore acknowledged that Chateau has retained its beneficial interest.

2. *Nev Equity:* The limited partners will contribute the equity required under the plan of reorganization of the debtor ("Debtor's Plan") in the ratio of their partnership interests set forth above (up to $2,150,000.00 in the aggregate) if (i) the Debtor's Plan is confirmed and (ii) Sussex assigns and conveys the difference between the 25% interest it previously held and the 1% interest it is retaining (i.e., 24%) free and clear of any claims, liens, security interests or the like so that the limited partners have the interests set forth above. In addition, subject to the foregoing, the limited partners, in the ratio of their respective now capital contributions, will provide funds sufficient to pay the legal and other expenses incurred to date in connection with the Debtor's Plan, not to exceed $200,000.00 (it being understood that sufficient detailed documentation must be provided), and such additional amounts from time to time as may be reasonably required for the payment of current and past due property taxes and the like in the judgment of the limited partners. All contributions by the limited partners pursuant to this paragraph from time to time are herein referred to as the "New Equity". The New Equity contributed shall earn a preferred return of 8 1/2% per annum from the date of contribution until the New Equity has been returned ("Priority Return"). The Priority Return shall be payable quarterly from net cash flow, if

any, on a cumulative basis. All or any portion of the Priority Return which has not been paid shall accrue and shall be paid from the first available net cash flow, if any. Distribution of net cash flow shall not be deemed to be a return of capital.

3. *Asset Management Fee:* For the period commencing on the date the Debtor's Plan is confirmed and ending on the fifth anniversary thereof ("Anniversary Date"). Sussex will be entitled to receive an asset management fee ("AMF") equal to 1% per annum of the gross rentals of the projects owned from time to time by the Partnership, payable quarterly (subject to annual reconciliation), to the extent of net cash flow, if any. In the event the funds from operations are insufficient to pay all or any portion of the AMF, such unpaid amount shall accrue, without interest, and shall be paid only to the extent net cash flow, or any net sale or net refinancing proceeds are sufficient to pay such amount. For purposes of this paragraph 3, "net cash flow" shall be the gross revenues reduced by all operating expenses of the partnership, including all debt service payments, working and capital reserves, and payment of the cumulative Priority Return.

4. *Fee Upon Sale*: Upon any sale of one or more of the projects of the Partnership after the Anniversary Date, Sussex shall be entitled to a fee equal to 1.125% of the gross selling price ("Sale Fee"). No fees shall be payable in the event of a foreclosure or a deed in lieu (provided the Partnership does not receive any cash consideration). There shall be no sale or other conveyance of the projects of the Partnership without the prior written consent of a majority in interest of the limited partners. Upon a sale, any accrued AMF will be payable to the extent the net sale proceeds are available to pay such fee after paying all outstanding obligations of the Partnership, paying the costs of

the sale or refinance transaction, returning the New Equity to the limited partners, and paying any arrearage in the cumulative Priority Return to the limited partners. In the event Sussex produces after the Anniversary Date a bona fide cash offer, in writing, to purchase the projects of the Partnership for $55,000,000.00 or more and the limited partners do not consent to the proposed sale, Sussex shall, in that event, be entitled to payment of the Sale Fee as if the sale had been consummated pursuant to the bona fide written offer. For purposes of this paragraph 4, "net cash flow" shall have the definition set forth in paragraph 3 above. The limited partners shall have the right to cause the projects to be sold at any time after the Anniversary Date.

5. *Investor's Representative:* It is agreed that Irving Smokler shall act as the investor's representative for the limited partners and shall oversee the management of the projects and the Partnership's affairs along with Sussex. In the event of a dispute, such dispute shall be submitted to the limited partners for a vote of the majority in interest of the partners shall control.

6. *Property Management*: The projects will continue to be managed by GFS of Texas, which manager shall be terminated without the consent of a majority in interest of the limited partners. Should the manager resign, its replacement shall be designated by a majority in interest of the limited partners.

7. *Partnership Agreement Amendment*: The parties agree to forthwith amend the partnership agreement of the Partnership upon confirmation of the Debtor's Plan (i) to reflect the foregoing, (ii) to prohibit Sussex from assigning or otherwise transferring its interest without the consent of the limited partners, and (iii) to add a provision which provides that in the

event Sussex assigns or transfers its general partner interest, or if such interest is assigned or otherwise transferred pursuant to the operation of law or otherwise (including a foreclosure), a majority in interest of the limited partners shall have the immediate right to remove Sussex as a general partner prior to any such assignment or other transfer and to replace Sussex with a general partner acceptable to the limited partners.

Please confirm that the foregoing accurately describes our agreement by making a copy of this letter, signing it, and returning it to the undersigned by facsimile and overnight delivery. Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

BH ASSOCIATES LIMITED PARTNERSHIP
CHATEAU ESTATES and
IRVING SMOKLER

By: s/ Irving Smokler
Irving Smokler
Authorized Representative

By:
Mandell L. Berman
Authorized Representative

AGREED AND ACCEPTED:

SUSSEX PROPERTIES, INC.

By: _____

and

By: _____

Appendix C

LAW OFFICES
HONIGMAN MILLER SCHWARTZ AND COHN
A Partnership Including Professional Corporations
2280 First National Building
Detroit, Michigan 48228-3583
Telecopier (313) 962-0176

M. ALAN GOCHA
Direct Dial Number
(313) 256-7007

Lansing, Michigan
West Palm Beach, Florida
Tampa, Florida
Orlando, Florida
Houston, Texas
Los Angeles, California

August 11, 1994

VIA TELECOPY

Mr. Chris Weil
Weil & Petrocci
1900 Plaza of the Americas
North Tower
Dallas, Texas 75201

Re: *DP Partners*

Dear Chris:

We are the attorneys for BH Associates Limited Partnership, Chateau Estates and Irving Smokler in this transaction. This will serve to confirm that during a telephone conference with BH Associates Limited Partnership, Chateau Estates and Irving Smokler today, Chateau Estates specifically authorized Messrs.

Appendix C

Berman and Smokler to sign the letter dated August 11, 1994 concerning the internal structure of DP Partners for and on behalf of Chateau Estates.

Should you have any questions, please call me.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN
By: s/ M. Alan Gocha
M. Alan Gocha

HAG/vz

cc: John Boll (via telecopy)
Maurice S. Binkow, Esq.